SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1524

HALLMARK INDUSTRY,
Petitioner,

vs.

REYNOLDS METALS COMPANY, STAMRAT PACIFIC COMPANY and HARVEY ALUMINUM, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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REYNOLDS METALS COMPANY, STANRAY PACIFIC COMPANY
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner Hallmark Industry prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit (Court of Appeals Numbers 71-1492 and 26729) entered in the above-entitled cases on December 5, 1973. A petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on January 18, 1974.

OPINIONS OF THE COURTS BELOW

The trial of this case was heard in the District Court for the Northern District of California. On June 24, 1970 the jury returned a verdict of actual damages in the amount of $211,800.00 in favor of petitioner Hallmark Industry (hereinafter "Hallmark") and against respondents Reynolds Metals Company ("Reynolds") and Stanray Pacific Company ("Stanray"). The jury found in favor of the third defendant, respondent Harvey Aluminum, Inc. ("Harvey".)

On December 11, 1970 the District Court granted judgment notwithstanding the verdict and, alternatively, a new trial against petitioner Hallmark and in favor of respondents Reynolds and Stanray. The opinion of the District Court is reported at 1971 CCH Trade Cases ¶73407 and a copy of that opinion is attached as Appendix A to this Petition.

On December 5, 1973 the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the District Court. The Court of Appeals' opinion is reported at 489 F.2d 8 (9th Cir. 1973) and is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1973. Petitioner Hallmark filed a Petition for Rehearing and Suggestion for Rehearing In Banc which was denied by the Court of Appeals on January 18, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

QUESTIONS PRESENTED

This case presents extremely important issues concerning the role of the jury in antitrust conspiracy cases, the standard of proof in antitrust conspiracy cases, the sufficiency of the evidence in antitrust conspiracy cases, the role of the Court in determining the credibility of witnesses and in making findings of fact contrary to the verdict of the jury, and the effect of judgment notwithstanding the verdict in antitrust cases on the decisions of this Court regarding the use of summary judgments, *Poller v. CBS,* 368 U.S. 464 (1962), and directed verdicts, *Continental Ore v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962). Specifically, the questions raised in this Petition are:

(1) Whether, in granting and upholding judgment notwithstanding the verdict, the Courts below improperly and unconstitutionally invaded the province of the jury by rejecting the verdict against respondents Reynolds and Stanray and by setting aside the jury's finding that said respondents combined and conspired to injure petitioner Hallmark in violation of Section 1 of the Sherman Act?

(2) Whether the Courts below erred and improperly and unconstitutionally invaded the province of the jury concerning the granting and upholding of a directed verdict in favor of respondent Stanray and against petitioner Hallmark as to its claim under Section 2 of the Sherman Act?

(3) Whether the Courts below erred by applying the standard of proof of clear and convincing evidence rather than a preponderance of the evidence?

(4) Whether the Courts below erred in excluding from the jury's consideration clearly relevant and material evidence of respondent Harvey's participation in the combination and conspiracy which was intended to result in a concerted refusal to deal with petitioner Hallmark in violation of Section 1 of the Sherman Act?

(5) Whether the evidence, taken in the light most favorable to petitioner Hallmark, establishes that the conduct of respondents Reynolds and Stanray constitutes a violation of Section 1 of the Sherman Act?

(6) Whether the evidence, taken in the light most favorable to petitioner Hallmark, establishes that Hallmark suffered injury and damages as a result of the anticompetitive conduct of respondents Reynolds and Stanray?

(7) Whether the District Court's ruling against petitioner Hallmark, granting judgment notwithstanding the verdict of a new trial, was void and clearly an abuse of discretion because the motions seeking relief were not timely filed?

(8) Whether the District Court's alternative grant of a new trial was improper?

STATUTES INVOLVED

(1) Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

(2) Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(3) The "Business Records" Act (28 U.S.C. §1732) provides:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.
>
> (b) If any business, institution, member of a profession or calling, or any department or agency of

government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

(4) Rule 43(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

". . . All evidence shall be admitted which is admissible under the statutes of the United States. . ., or under the rules of evidence applied in courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the

most convenient method prescribed in any of the statutes or rules to which reference is herein made."

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust suit brought by the petitioner Hallmark under Section 4 of the Clayton Act (15 U.S.C. §15) for damages caused by reason of the respondents Reynolds, Stanray, and Harvey's violation of Section 1 of the Sherman Act (15 U.S.C. §1) and Stanray's violation of Section 2 of the Sherman Act (15 U.S.C. §2). Hallmark charged that the respondents combined and conspired to restrain trade and that Stanray attempted to monopolize the relevant market for aluminum troop shelters to be sold to the United States Government for use in Vietnam. The crux of the case is that respondent Stanray, the second low bidder, sought to prevent Hallmark, the lowest bidder for the aluminum hut contract, from obtaining its necessary source of aluminum supply by combining and conspiring with Reynolds and Harvey and by engaging in various anticompetitive and predatory practices.

B. Course of Proceedings in the Courts Below

Petitioner Hallmark filed its complaint against respondents on May 10, 1967. After 3 years of discovery, the case went to trial on April 14, 1970, before the Honorable Robert F. Peckham, Judge, United States District Court for the Northern District of California. The trial lasted two months and consumed 4,000 pages of transcript.

During the trial, the lower court granted a direct verdict on Hallmark's attempt to monopolize claim on the ground that "prefabricated aluminum huts for use by the Government in Vietnam" was not an identifiable market capable of monopolization.

The issue on conspiracy was submitted to the jury. On June 24, 1970, the jury returned a verdict of actual damages in the amount of $211,800.00[1] in favor of petitioner Hallmark and against respondent Reynolds and Stanray. The jury found that a conspiracy or combination existed among or between those two defendants. (R.[2] 196.) The jury found that respondent Harvey was not a party to that conspiracy or combination.[3]

On the day of the jury's verdict (June 24, 1970), the District Court announced that "the judgment has been entered as of today. So the ten days (for post-verdict motions) will start running today." (T. 3964.) Nevertheless, respondents' motions for judgment notwithstanding the verdict or new trial were not filed until July 9, 1970, or fifteen days after the date that the District Court ordered entry of judgment on the verdict. Reynolds and Stanray did not challenge any instruction or evidentiary ruling.

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[1]The lower court, over Hallmark's objections (3860, 3861) repeatedly instructed the jury that any damages would be trebled. (3846, 3847.) In their opposition to Hallmark's application for an attorney's fee, Reynolds and Stanray argued that the conspiracy was not difficult to prove yet the jury "assessed damages on *only* approximately ⅓ of what plaintiff was seeking."

[2]"R" refers to the Record on Appeal in these cases; "T" refers to the Reporter's Transcript.

[3]In weighing the jury finding in favor of respondent Harvey, the Court should note that crucial evidence of Harvey's participation with Reynolds and Stanray was excluded from the jury. (T. 999-1000.)

On December 11, 1970, the District Court granted judgment notwithstanding the verdict or, alternatively, a new trial to respondents Reynolds and Stanray.[4] Thus, after three years of pre-trial discovery, a trial which consumed two months of judicial time and 4,000 pages of transcript, and after careful consideration and deliberation by the jury the Court set aside the verdict and rejected the damage award in favor of the antitrust plaintiff.

On December 5, 1973, in an opinion written by Judge Otto Skopil, Jr., the United States Court of Appeals for the Ninth Circuit affirmed the lower court. The opinion held (1) the evidence was insufficient to show a conspiracy; (2) Stanray had no specific intent to monopolize "the market for aluminum huts in Vietnam" and (3) the excluded evidence was harmless.

On January 18, 1974, the Court of Appeals denied Hallmark's petition for rehearing and suggestion for rehearing in banc.

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[4]The trial Court adopted the respondents' argumentative briefs practically verbatim. Compare various passages of the Order of the District Court granting judgment notwithstanding the verdict and/or new trial (R. 705, *et seq.*) and Defendants' Memorandum (R. 509, *et seq.*) in Support of Judgment Notwithstanding the Verdict and New Trial: Order, p. 1 with D. Memo., p. 1; Order, p. 2 with D. Memo., pp. 3, 4, 7; Order, p. 3 with D. Memo., p. 10; Order, p. 4 with D. Memo., p. 12; Order, p. 5 with D. Memo., p. 9, D. Supp. Memo., p. 8; Order, p. 6 with D. Supp. Memo., p. 9; D. Memo., p. 17; Order, p 7 with D. Memo., pp. 17-19; Order, p. 8 with D. Memo., p. 20; Order, p. 9 with D. Memo., p. 20 and Supp. Memo., p. 7; Order, p. 10 with D. Supp. Memo, p. 7 and 11; and Order, p. 11 with D. Supp. Memo., p. 15; Order, ft. nt., p. 13 with D. Memo, ft. nt., p. 18. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1962) and *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339, 1340 (9 Cir. 1960).

C. Statement of Facts

The facts of this case must be viewed in the light most favorable to petitioner Hallmark whom the jury found by its verdict to be the victim of a Reynolds-Stanray conspiracy. The jury viewed the "whole picture" and totality of circumstances surrounding the respondents' conduct and the inferences drawn by the jury should be respected. Instead the Courts below refused to give petitioner the benefit of the full evidence and chose to tightly compartmentalize the various factual components of the alleged conspiracy. This Court has recognized that such an approach improperly invades the province of the jury and denies a plaintiff of the significant right to trial by jury in antitrust cases. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

With these legal principles in mind, the "whole picture" of respondents' conspiracy to promote Stanray's attempt to sell metal huts to the government (for use in Vietnam) including efforts to exclude low-bidding Hallmark from that market unfolds (chronologically) as follows:

1. The Reynolds-Stanray Combination

Stanray had previously sold metal huts to the Government for use in connection with Atomic Bomb Tests (T. 1008) and the Korean War. (T. 939.) Although these huts were suitable for Government use they were not suitable for commercial markets. (T. 3179.) Because Stanray had been unable to sell such huts commercially (T. 3184), Kibbey and Warner (Stanray executives) discussed the possibility of reactivating their 16 year old tools and dies

for another Government need, the war in Vietnam. (T. 1008, 1338-39, 3179.) "Our idea was to try and promote a request" (T. 1338) for an aluminum building (T. 3226, 3228) for use in Vietnam. (T. 3226.)

To this end, Kibbey, (Stanray) met with Hall (Reynolds) and discussed the ideas. (T. 1339, 3179.) Kibbey felt Hall would be interested in selling the aluminum to Stanray for the proposed huts (T. 1340) and could assist in the promotion of the idea to the Government. (T. 1349.) Thus, Stanray and Reynolds began at this early date to work together for their mutual advantage and profit in selling this proposal to the Government. Stanray would be able to use its old design, tools and dies; Reynolds would have the opportunity to supply vast amounts of aluminum.

Before the actual submissions of the bids, Reynolds and Stanray representatives had another meeting. (T. 1188, 1189.) Mr. Jackson of Stanray wanted "to learn as much as I could about the kind of competition Stanray was up against." (T. 1191.) Jackson was surprised that Reynolds would bid (T. 1191), but was advised by Reynolds that their bid would be non-competitive. (T. 1192.) Reynolds also advised Jackson that Hallmark would bid. (T. 1188, 1189.)

Stanray's Jackson then notified his superior Warner that Hallmark was their competition (T. 1025, 1026), and Warner instructed Jackson to get a financial history of Hallmark (T. 1026.) Jackson then secured a Dun & Bradstreet report on Hallmark. (T. 1198-1202.)

After the bids, Montgomery called Fox from Hawaii and advised that Hallmark and Stanray were in the run-

ning. (T. 1391, 1391.) When Montgomery returned from Hawaii he told Fox that Hallmark "had a very good possibility of being awarded the contract." (T. 1400.)

Hallmark submitted the lowest bid which was approximately $1,000,000 less than Stanray's second lowest bid, and which contemplated the use of cheaper priced aluminum.

Hallmark contacted the George Widman Company as a potential subcontractor and supplier of aluminum. When Stanray learned of this (T. 1088), Stanray urged or threatened Widman not to supply Hallmark. (T. 1082-1091.) Stanray's Warner testified that he told Widman "if I had my druthers or if I had my way he would deal only with us." (T. 1082, 1084.)

Stanray also learned from Widman Company that Reynolds was quoting Hallmark. (T. 1221.)

On May 9, Stanray's Warner phoned his superior, Kibbey, and asked that the latter complain to Reynolds about Reynolds backing Hallmark. (T. 1093-1096; Pl. Ex. 72.) Warner told Kibbey that "we were having a problem, and I felt it was a very grave one, with Reynolds*** Someone had to be financing this under financed organization of Hallmark." (T. 1093-1094.) Warner complained about Reynolds' original bid "which I damn well resented", and what appeared to be Reynolds "trying to fall back on a secondary supply order for this contract and would have their cake and eat it too." (T. 1094.) Stanray viewed this as Reynolds not dealing ". . . with the people they are supposed to deal with." (T. 1104.) Kibbey told Warner "he would try to find out if they (Reynolds) were financing" Hallmark, and that he would

call his acquaintance Paul Fox of Reynolds. (T. 1095.) Kibbey phoned back and told Warner that Reynolds would not finance Hallmark and that they were going to send Reynolds' representatives out to Stanray. (T. 1096.)

Fox (Reynolds) wrote Kibbey (Stanray) on May 9 acknowledging Kibbey's call that morning and advising that Reynolds would send out representatives "in the intent of supplying Stanray with all the information and know-how that we have on the 3000 aluminum troop shelters." (T. 3033; Pl. Ex. 50.) Fox said the Reynolds' representatives would contact Stanray's Jackson "since our original contact was with Mr. Jackson." Fox sent a Reynolds' sales representative, Mr. Montgomery, to Stanray's facility that very day. (T. 3033.)

After talking to Stanray's Kibbey, Fox called Reynolds' Credit Manager, Bassett (T. 3033, 3038, 2836-2840) and asked "how could we sell a company with a deficit working capital." (T. 2840.) This was the identical question Stanray's Warner asked Montgomery when Montgomery arrived at Stanray on May 10 as a result of Kibbey's complaint to Fox on May 9. (T. 1097-1102.) Montgomery responded "that there were many ways to finance a project of this sort for a company of this size." (T. 1097.)

Thus, on May 9, 1966, Stanray complained to Reynolds (i.e. Mr. Fox), concerning the anticipated dealings between Reynolds and Hallmark. Fox (Reynolds), according to his own testimony, then talked to Messrs. Jarvis and Bassett (Reynolds' employees), concerning prospective plans for financing Hallmark. (T. 3033; 3039-3047.) During these conversations Fox discussed with Bassett the idea of cash in advance or a letter of credit from Hallmark. (T. 3038-3039.)

Bassett advised Fox that Reynolds could require a letter of credit for the full amount of the order (knowing the amount to be sizeable.) (T. 2841-2850, 2857, 2897.) Bassett gave this advice even though he did not know the amount of the order (T. 2898), *or* the delivery schedule (T. 2897-2906), *or* the type of aluminum involved. (T. 2897-2906.) Ultimately, the defendants attempted to justify the letter of credit on basis of the delivery schedule and Hallmark's financial condition. Yet, on May 9th, when the requirement was devised, there is evidence that Reynolds did not know the delivery schedule, nor had Bassett yet investigated Hallmark's credit. (T. 2850-2856.)

On May 10, Montgomery (Reynolds) met with Stanray representatives in response to Stanray's complaint to Reynolds (T. 1096-1102), and conceded that there were many ways to finance a company such as Hallmark on a project of the type involved. (T. 1099-1100; 1223-1224.)

At this time, Stanray knew that Hallmark's bid was lower, and they told Montgomery they were upset that Hallmark was a possible awardee of the contract. (T. 2534.) They questioned Montgomery "about how low Hallmark could have bid." (T. 2534.) Montgomery discussed the possibility of Stanray using cheaper aluminum. (T. 1209; 1223.) But Stanray wanted to stay with its old design using more expensive and greater amounts of aluminum and to win the Government contract in spite of the higher bid. (T. 1098; 1216.) This evidence supports the inference which the jury could have reasonably drawn that since Stanray could not beat Hallmark's price on a competitive basis, it was determined to eliminate

Hallmark using anticompetitive means. The evidence also supports the inference of Reynolds' motive for conspiring with Stanray in order to sell not only more aluminum but also more expensive aluminum.

On May 11, Warner (Stanray), learned that Montgomery (Reynolds), went to Hallmark after leaving the Stanray plant. (T. 1102.) Warner then phoned Montgomery and accused Reynolds of having "violated" their faith. (T. 1103.)

On May 12, Jackson (Stanray), learned from Widman that Reynolds would supply Hallmark. (T. 1261-1267.) Incensed about this, Stanway's Jackson (after talking with Kibbey), phoned Fox (Reynolds). (T. 1263-1264.) Jackson informed Fox that he was "highly incensed" and Fox agreed to talk to Montgomery. (T. 1263.)

On May 13, Fox talked with Bassett (Reynolds) and admitted that the Montgomery quote to Hallmark was $150,000 above book price. (T. 2867.) It was made clear to Bassett that the letter of credit was to include this excessive $150,000 figure. (T. 2868.) It was also on this date—after the decision to require a letter of credit in the full amount—that Reynolds' Bassett first received a credit report on Hallmark. (T. 2849-2850.) Nevertheless, even though the credit report was seven months old (T. 2852), and showed that Hallmark's position was improving (T. 2854), Bassett did nothing to gain more information and remained adamant as to what Reynolds knew would be the impossible requirement for a letter of credit in the full amount. (T. 216-223; 2815; 2858-2859; 2870-2877.)

Thus, in the face of testimony from an independent witness that Reynolds had originally agreed to an escrow

arrangement in dealing with Hallmark (T. 3558), and the recognition that the letter of credit requirement could not be met by Hallmark (T. 216-223; 2905), Reynolds—after many contacts with Stanray representatives—was adamant on its demand for Hallmark to furnish a letter of credit in the full (inflated) amount of the order.

Accordingly, on Friday, May 13, Bassett drafted a letter informing the Government that Reynolds would not supply Hallmark without a letter of credit in the full amount; this letter was sent on Saturday, May 14. (T. 2817.)

Meanwhile, on May 16, Stanray suspecting that the presence of Reynolds' representatives at Hallmark meant that Reynolds was still "backing" Hallmark (T. 2921), Kibbey (Stanray) telephoned Hall (Reynolds), at night, at Hall's residence. (T. 2921.) Kibbey was upset about reports of Reynolds and Hallmark working together; he informed Hall that he was livid about it. (T. 2922; 2954.) (At this point it must be recalled that Kibbey and Hall were the individuals who met in January to plan joint efforts by Stanray and Reynolds to promote the aluminum hut project. The jury could have reasonably inferred that Kibbey was upset and livid because he believed that Reynolds was attempting to renege on its original agreement and understanding to support Stanray.)

During the Kibbey-Hall telephone conversation, Hall (Reynolds), assured Kibbey (Stanray) that he would investigate the situation and "report back" to Kibbey. (T. 2922-2939.) Hall immediately phoned Fox, but Fox was not at home. (T. 2937.)

On the next day, May 17, Hall (Reynolds) phoned Bassett (Reynolds) and told him of Kibbey's call and that the Stanray people were "livid" about Hallmark. (T. 2923, 2953, 2954.) Undoubtedly, Bassett then informed Hall that the letter of credit requirement was settled and finalized, with notice having been recently sent to the Government.

Hall then telephoned Kibbey (Stanray), and stated that Reynolds would require a letter of credit for $2,000,000. (T. 2923.) (Actually the letter of credit requirement was $1,900,000. The erroneous figure of $2,000,000 relayed from Hall to Kibbey was to be quoted by another potential Hallmark supplier—Harvey Aluminum—who, after meetings with Stanray representatives, stated that Harvey's requirements would be "* * * the same as * * * Reynolds Aluminum * * * a $2,000,000 letter of credit.") (T. 258.)

Without advising Hallmark and only advising the Army and Stanray, Reynolds required a letter of credit for the full amount of Hallmark's aluminum needs. Stanray then advised the Army that Hallmark could probably not perform because Hallmark "would probably not be able to obtain a letter of credit." (T. 1880-1881.) The Army advised Hallmark that Reynolds required a letter of credit. Hallmark contacted Reynolds' representatives and stated that they knew Hallmark could not furnish a letter of credit for the full amount, however, Reynolds remained adamant.

From the above recitation of the evidence (which cannot approach the complete picture unfolded in the nearly

4,000 pages of trial transcript), the jury's finding of a conspiracy between Stanray and Reynolds was most reasonable. The two companies began to promote the aluminum hut project in January of 1966. Stanray desired to utilize old and otherwise obsolete tools and dies. Reynolds desired to supply the aluminum. In pursuing the plan, Reynolds submitted a high, "rigged," "non-competitive" bid on the project presumably to assist Stanray. (At the very least, so as to not interfere with Stanray by bidding lower for the project.)

When Hallmark appeared on the scene with a lower bid for producing the kind of hut that the Government preferred (T. 1110-1111), Stanray in furtherance of the combination, began its intensive efforts to eliminate Hallmark from competition. After much contact between Stanray and Reynolds, Reynolds first submitted a highly inflated quote for supplying the required aluminum. (T. 2407; 2461; 2867-2869; Def. Ex. E-39A.)

When Hallmark unexpectedly accepted this Reynolds' offer, and after more communications between Stanray and Reynolds' representatives, the unreasonable letter of credit requirement was imposed on Hallmark, notwithstanding earlier statements by Montgomery (Reynolds), that there were "many ways" to finance a company like Hallmark under these circumstances (T. 1097-1100; 1223-1224), and that an escrow arrangement would be acceptable. (T. 3558; 2910-2912.)

Both Stanray and Reynolds knew that Hallmark would not be able to meet the letter of credit requirements. Thus, they were able to keep Hallmark from obtaining aluminum at a fair and competitive price. Stanray also urged other

suppliers such as Widman Co. and Harvey Aluminum not to deal with Hallmark.

Thus, the jury finding that Stanray and Reynolds combined and conspired in an attempt to eliminate Hallmark from competition for the aluminum hut contract was improperly set aside by the Courts below.

2. Harvey's Participation in The Reynolds-Stanray Combination

Hallmark found it impossible to meet Reynolds' exorbitant letter of credit demand, but it continued efforts to secure the aluminum hut contract at the low bid. To this end, Hallmark next approached Harvey to negotiate for the necessary supply of aluminum.

On May 25, 1966 Harvey initially agreed to deal with Hallmark. (T. 229-230.) At that time nothing was said about a letter of credit. However, at that time Harvey was also working closely with respondent Stanray on an unrelated multimillion dollar project, in which Stanray was constructing a manufacturing facility for Harvey. Representatives of Harvey and Stanray were in frequent communication. Thus it was on May 27, 1966 that Harvey—at the request of Stanray—refused to supply aluminum to Hallmark unless Hallmark would provide a letter of credit similar to that required by Reynolds. (T. 258, 830, 837.)

In this respect, the testimony of Mr. Douglas Whitt, President of Hallmark, concerning a telephone call be received from Mr. R. J. Parker (then credit manager of defendant Harvey) is extremely significant:

> "Q. All right. What, if anything did Mr. Parker say to you; and what, if anything, did you say to Mr. Parker?

> A. I believe I had called Mr. Parker and it was somewhere around 9:00 a.m. in the morning, and Mr. Parker told me this was a job for the big boys and for us not to become involved in it; that Harvey's requirements at that time were going to be the same as the requirements of Reynolds Aluminum—a $2 million letter of credit." (T. 258.)

Petitioner contends that this extreme and outrageous condition for so large a letter of credit was nothing more than a subterfuge for Reynolds' and Harvey's refusal to supply Hallmark.

The crucial factor in determining Harvey's liability for conspiring with the other two defendants to boycott Hallmark is the evidence of communications between representatives of Harvey and Stanray which demonstrate Harvey's knowledge as to Reynolds' refusal to deal with Hallmark and Harvey's willingness at Stanray's request, to join Reynolds in a concerted refusal to supply aluminum to the plaintiff.

The crucial question of fact is: What occurred between May 25, 1966 when Harvey preliminarily agreed to supply aluminum to Hallmark and May 27, 1966 when Harvey refused to supply without the $2,000,000 letter of credit? The intervening occurrence was a meeting on May 26, 1966 between representatives of Stanray and Harvey. The significance of that meeting can only be appreciated by reading the Daily Sales Reports prepared by Donald Shrank (then Sales Engineer for Harvey.) These reports (Plaintiff's Exhibits for identification, 62, 63, 64, 65, 80) reflect a series of conversations between representatives of Harvey and Stanray concerning Hallmark and its bid

on and potential award of the Government contract for construction of the 3,000 prefabricated huts. Particularly, these discussions evidence Stanray's intention to eliminate Hallmark and Harvey's notice and knowledge thereof.

The Shrank reports[5] also demonstrate Harvey's willingness to aid Stanray to get the Government contract because, like Reynolds, Harvey would have preferred to do business with Stanray rather than Hallmark. Under specifications, submitted by Hallmark and Stanray, Harvey, as a potential sub-contractor and supplier, would have sold much more aluminum had Stanray's bid been accepted. (P. Exch. 80; Shrank Deposition, p. 101)[6]

Also, the Shrank report dated May 27, 1966 would have been of great significance in describing the aforementioned meeting on May 26, 1966 in which the "Stanray people were in closed door session with Homer Harvey (Chief Executive Officer of Harvey) and Bill DeWar (Sales

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[5]The documents in question were produced by Shrank not defendant Harvey to a subpoena duces tecum, since Shrank, at the time of production, was not employed by defendant Harvey.

[6]June 2, 1966

George Widman, Tetro

"Tetro spent last two days with Hallmark in Paterson, California. He needs 450,000 pounds of virel but it must be diamond embossed. He also will need 1,000,000 of 3004 clad sheet. Will take up with Lyne but I am sure we are dead. There is only about—pounds of mil finished virel involved. Was assured of this much. Nothing will be done about ordering until Hallmark has been awarded contract. If Stanray gets it, we will be able to supply all of Widman's needs about 4,000,000 pounds—PRAY FOR STANRAY. Tetro advised Ador-Security will get extrusion order when Hallmark gets contract." (Pl. Ex. 80 I.D.)

"Q. But as between Hallmark and Stanray you were clearly anxious at this point of time to see it awarded to Stanray.

A. If it meant the difference between writing an order for 60,000 pounds and 4,000,000, certainly Stanray. That is the only implication that I have there. (Shrank Depo. 101.)

Manager of Harvey's Aluminum Division)" (P. Exh. 65; Shrank Deposition, pp. 84-86.)[7]

From the above, the jury could well have found that, in the May 26, 1966 "closed door session" Stanray informed Messrs. Harvey and DeWar of its intent to take the contract award from Hallmark, and of Reynolds' demand of an exorbitant letter of credit as a refusal to deal with Hallmark. This would then explain the telephone conversation between Harvey and Hallmark on the very next day (May 27, 1966) in which Hallmark was told not to "become involved in the Government job and that Harvey's requirements were going to be the same as Reynolds—"a $2,000,000 letter of credit. (T. 258.)

The District Court refused to admit the Shrank Reports as evidence. (T. 999-1000.) The Court also refused to permit into evidence certain portions of the depositions of Shrank, DeWar, and Walter Gibson (Purchasing Agent for Stanray.) More importantly, the excluded Shrank Reports and testimony thereon would have impeached the

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[7]May 27, 1966
Stanray Pacific, Gibson
"Delivered special envelope for Lou Warner, Stanray President. This came from Bill DeWar. Apparently this envelope contained a financial guarantee from which Stanray is to sign if they are awarded immediate contract to build 3,000 aluminum prefab buildings. At the moment Hallmark is still considered low bidder. I was not able to see Lou Warner because he was tied up with Army inspection team. To be sure, Stanray is doing this in first rate manner. They have erected a section of the aluminum building they propose. Walt Gibson still needs price on extrusions, but Bill DeWar advised me Stanray was given prices yesterday when Stanray people were in closed door session with Homer Harvey and Bill DeWar. DeWar declined to tell me prices so I can only assume they might be different than those I was prepared to give Gibson. Therefore, did not give any prices." (Pl. Ex. 65 I.D.)

otherwise damaging testimony of DeWar and Gibson[8] concerning their anticompetitive motives *vis-a-vis* Hallmark and their knowledge of and participation in meet-

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[8]May 12, 1966
Stanray Pacific & Gibson
"Followed up on loans about award of 3,000 aluminum building to Northern California Company. Gibson had heard same time last week Gibson felt job would go to Reynolds or Alcoa, but he wasn't optimistic, but if Hallmark Company in Northern California was low bidder and Stanray was second low Gibson thinks they will take another run at it and try to get Hallmark disqualified on the basis of Hallmark's weak financial position, will follow closely." (Pl. Ex. 62 I.D.)
Stanray, Gibson
"Gibson thinks they stand good chance of taking 3,000 aluminum building bid award from Hallmark in Paterson, California. Two of the upper hierarchy of Stanray are working on the Army Procurement Agency in Honolulu in an effort to have job awarded to Stanray. There is something in the area of 1,000,000 pounds of soft alloy extrusion and 300,000 or 400,000 pounds of sheet. This sheet in addition to that discussed at George Widman Company. Gibson will have detailed extrusion requirement in a few days." (Id.)
May 20, 1966
Stanray Pacific, Gibson
"Picked up delivery sheet on 3,000 aluminum buildings. Total poundage on extrusions is slightly over 1,000,000 pounds. There is sheet also; about 700,000 pounds. Stanray very confident about their chances of knocking the Hallmark Company out of this. One Army group from Honolulu will inspect Stanray Plant on Monday or Tuesday." (Pl. Ex. 63 I.D.)
May 25, 1966
Stanray, Gibson
"Advised Gibson we were still reviewing five bids on 3,000 aluminum buildings but very likely we would low bid two of them. The sheet we would bid is 5005 instead of 3004. Gibson confident Stanray will win out over Hallmark. So far the Army has not inspected Stanray facility but it is expected they will do so before this week is over." (Pl. Ex. 65 I.D.)
June 1, 1966
Stanray Pacific, Gibson
"Followed up on progress Stanray is making with Army in Stanray attempt to win an award on 3,000 aluminum buildings. Last Friday the Army was there. So far there has been no decision made by the Army. Stanray continued to be optimistic. Gibson thinks decision must be made by end of week. Was assured we would receive have chance of extrusion sheet business should Stanray win the contract." (Pl. Ex. 80 I.D.)

ings and discussions between Stanray and Harvey representatives concerning the elimination of Hallmark.

REASONS FOR GRANTING THE WRIT

I. THE RULINGS BELOW UNDERMINE THIS COURT'S DECISIONS CONCERNING THE ROLE OF THE JURY IN DETERMINING THE EXISTENCE OF A CONSPIRACY IN ANTITRUST CASES.

This case presents another example of the growing trend of District Courts and the Court of Appeals for the Ninth Circuit to invade the province of the jury in civil antitrust cases.

These cases clearly reject the rulings of this Court as to the crucial role of the jury in resolving antitrust claims. As was stated in *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500, 504 (1959):

> "The right to trial by jury . . . is, in fact, an essential part of the Congressional plan for making competition rather than monopoly the rule of trade . . ."

The constitutional right to trial by jury in our case is clear. See this Court's recent opinion in *Curtis v. Loether,* ..... U.S. ....., 94 S.Ct. 1005 (1974); see also *Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27 (1916); *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962). But over and above the Seventh Amendment constitutional right, our case concerns the important role of the jury in the vigilant enforcement of national antitrust policy.

More importantly, the question decided by the Courts below, in disregarding the jury verdict in favor of Hallmark, related directly to the existence of a Reynolds-Stanray conspiracy and the motive and reasons behind

that conspiracy. As such our case falls squarely within this Court's opinion and ruling in *Poller v. C.B.S.*, 368 U.S. 464, 473 (1962):

> ". . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. *It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised . . . trial by jury* [*has*] *long been the hallmark of even handed justice.*" (Emphasis added).

Yet without regard for the recognized role and competence of the jury and in the face of the evidence of conspiratorial behavior of Reynolds and Stanray, the District Court below set aside the unanimous verdict of the jury. And the Court of Appeals affirmed. The lower courts thus chose to accept the defendants' subjective version of the evidence rather than the objective interpretation reflected in the verdict.

The District Court and Court of Appeals below totally ignored the evidence in the record that Reynolds had preliminarily agreed to supply Hallmark under an escrow arrangement prior to Stanray's vigorous complaints to Reynolds and that the letter of credit requirement emerged in light of those complaints by Stanray and assurances by Reynolds that the latter would aid Stanray. (T. 3558; 1263-1264.)

The lower courts also completely disregarded plaintiff's evidence as to Reynolds' motive for aiding Stanray in its attempt to exclude Hallmark from competition for the

bid. Stanray's proposal was far more expensive calling for greater quantity of and more costly aluminum. (T. 1098; 1216.) Reynolds would have derived substantially more profit in supplying Stanray rather than Hallmark.

As set forth in greater detail in the Statement of Facts, *supra,* there was an abundance of evidence to support the jury's finding of a Reynolds-Stanray combination. This included meetings between representatives of the two companies to promote the aluminum hut project; complaints by Stanray executives when they believed that Reynolds may have been aiding or financing Hallmark (T. 1093-1096); later, Stanray representatives being "incensed" (T. 1263-1264) and "livid" with Reynolds' failure to cooperate with Stanray; this was seen by Stanray as a violation of faith on the part of Reynolds (T. 1103); in the face of these complaints, the Stanray people received assurances from Reynolds that the matter would be taken care of; Reynolds had preliminarily agreed to sell aluminum to Hallmark under an escrow arrangement but after the complaints by Stanray, Reynolds demanded a letter of credit from Hallmark in the amount of $1.9 million dollars; this exorbitant credit demand came notwithstanding Reynolds' knowledge that its maximum financial exposure would be only $500,000 dollars and that Hallmark would be unable to meet a credit demand of nearly two million dollars.

Instead of viewing the total picture of the Reynolds-Stanray conduct, the courts below seemed to accept the defendants' version of the facts[9] and focused on only two

[9]The District Court's opinion is a nearly verbatim adoption of the factual and legal arguments in defendants' memoranda in support of judgment n.o.v. (See R. 509, *et seq.* and 569, *et seq.*)

or three factors. The Courts accepted as fact that Reynolds had no motive for combining with Stanray, even though there was evidence that if Stanray was awarded the contract it would have purchased a greater quantity and a more expensive grade of aluminum from Reynolds than the Hallmark bid called for.

The courts below accepted the defendants' view of the facts that Hallmark was a credit risk and that the letter of credit requirement was a reasonable exercise of independent business judgment on the part of Reynolds. Of course the jury found otherwise recognizing that the evidence demonstrated Reynolds' willingness to do business with Hallmark under an escrow arrangement until Stanray registered its emphatic complaints and received assurances from Reynolds' executives that Reynolds would aid Stanray in ejecting low-bidding Hallmark from the picture. The $1.9 million letter of credit was not reasonable because Reynolds' maximum financial exposure was merely one-quarter of that amount. Moreover, the evidence of communications, complaints and assurances passing between Reynolds and Stanray clearly indicates that the exorbitant and impossible credit demand was a decision arrived at through a combination between Stanray and Reynolds, rather than independently by the latter.

In dissecting and compartmentalizing various portions of plaintiff's evidence, the courts below have flagrantly violated this Court's mandate in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) and such lower federal court rulings as *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952) and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 (9th

Cir. 1964) that the jury be given the full benefit of all the evidence without tightly compartmentalizing various factual components of the alleged combination.

The business reasons of the parties may be considered by the jury in determining whether the parties acted conspiratorially or independently; but, as stated by the Supreme Court in *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966):

> "It is of no consequence for purposes of determining whether there has been a combination or conspiracy under Section 1 of the Sherman Act that each party acted in its own lawful interests."

Moreover, it has been recognized that the difficulty of proving a conspiracy is greater in cases such as ours, where there are only a few conspirators. Rahl, Conspiracy and the Antitrust Laws, 44 Ill. L. Rev. 743, 757 (1950). Courts have not and should not compel a showing of direct evidence to prove conspiracies. *Flintkote Co. v. Lysford*, 246 F.2d 368 (9th Cir. 1957); *Esco Corp. v. United States*, 340 F.2d 368 (9th Cir. 1965). It is well known that in the modern world of sophisticated business practices, corporate officers do not keep written records of their anticompetitive agreements and activities. As the Third Circuit Court of Appeals observed:

> "In this modern era of increasing subtleties, it is rare indeed for a conspiracy to be proved by direct evidence. There is no dispute over the proposition that circumstancial evidence will sustain a finding of conspiracy". *Milgram v. Loew's Inc.*, 192 F.2d 579, 583 (3rd Cir. 1951), cert. denied 343 U.S. 929 (1952).

In the final analysis, the jury must decide whether, considering all of the relevant circumstances, the defend-

ants have acted independently or in concert. *Loew's Inc. v Cinema Amusements,* 210 F.2d 86 (10th Cir. 1954). As was stated in the *Loew's* case:

> ". . . it is not necessary in a case of this kind that there be direct evidence of a conspiracy. . . . More often than otherwise, direct evidence of such a conspiracy is not available. But it may be proved by a development and collation of the circumstances. It may be inferred from the things said and done." 210 F.2d at p. 93, citing *Eastern States' Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600 (1914).

This Court has often recognized that summary judgments and directed verdicts against an antitrust plaintiff's claims are to be used sparingly and only under the most extreme of circumstances. The Court has not as frequently in the past dealt with cases such as the present one where a District Court grants judgment notwithstanding the verdict after a jury has found in favor of an antitrust plaintiff's claims.

The judgment n.o.v. in cases such as ours is equally, indeed, more destructive to antitrust policy than other forms of summary procedures.

For example, in our present case, plaintiff Hallmark engaged in several years of pre-trial discovery, prepared for trial and presented salient evidence of contact and combination between Reynolds and Stanray. The trial lasted for more than two months and the jury—under proper instructions—returned its unanimous verdict for Hallmark.

No more could have been expected of an antitrust plaintiff. Yet notwithstanding plaintiff Hallmark's efforts and

the evidence of conspiracy which it discovered and presented, the District Court granted judgment n.o.v. in favor of defendants essentially because the Court (not the jury) was unconvinced of defendants' motives and believed —contrary to evidence in the record—that Reynolds decision to require a nearly two million dollar letter of credit as a condition for supplying Hallmark was an independent judgment rather than a decision made pursuant to an agreement with Stanray.

The use of the extreme judgment N.O.V. in cases such as this one will have the inevitable effect of discouraging antitrust plaintiffs and their attorneys from even initiating meritorious claims and litigation. Why should vast amounts of time, energy and funds be expended if a plaintiff—even after demonstrating to the unanimous satisfaction of the jury that its antitrust claims are justified—has its verdict taken away because the judge was uncertain about defendants' motives or desired more direct evidence of conspiracy?

The result will necessarily be that private suits will be discouraged and antitrust enforcement will be diminished.

Already within the District Courts of the Ninth Circuit, the ruling in our case is being followed as precedent for the grant of judgment N.O.V. and/or new trial solely on the basis of District Judges' disagreement with the juries concerning the evidence of motive and conspiracy. See, for example, *England v. Chrysler Motor Corp.*, ____ F.2d ____ (9 Cir. 1974); *Coin Automated Products v. Maytag Co.*, N.Dist. Calif., Civil Case No. C-70-2519-SW (July 31, 1973); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, C.Dist. Calif., Civil Case No. 71-3085-DWW (1973).

All of these cases, including our present one, clearly involved improper invasions by the trial judge into the province and function of the jury. All of these cases seem to reject the repeated mandates of this Court regarding the crucial role which the jury is to play in determining motivation and the existence of a conspiracy in antitrust cases. As this Court so astutely observed in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927):

> "And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. 'Clearly,' as was said by the Court of Appeals, 'it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' This question was submitted under proper instructions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact."

The preoccupation of the courts below with Reynolds' "motive" was a clear invasion of the province of the jury and hence a wholly improper basis for its grant of judgment notwithstanding the verdict. The jury's verdict was clearly consistent with this Court's statements of law concerning the vigilant enforcement of antitrust policy. The lower courts' rulings herein have disregarded this Court's mandate concerning the role of the jury in antitrust cases and for that reason certiorari should be

granted to reaffirm and reinforce the right and crucial importance of jury trials and findings in antitrust cases.

II. THE COURTS BELOW IMPROPERLY GRANTED AND UPHELD A DIRECTED VERDICT AGAINST PETITIONER HALLMARK'S CLAIMS UNDER SECTION 2 OF THE SHERMAN ACT [15 U.S.C. §2].

The directing of a verdict against Hallmark as to its Sherman Act, Section 2 claims against Stanray clearly undermines this Court's landmark rulings as to the meaning and application of that statute. *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951); *Standard Oil of New Jersey v. United States,* 211 U.S. 1 (1910). Moreover, by directing a verdict, the Court below utilized summary procedures which this Court has condemned with respect to proof of motive and intent in antitrust cases. See *Poller v. C.B.S., supra; Eastman Kodak Co. v. Southern Photo Materials Co., supra.*

It should also be noted that the rulings of the Courts below dramatically conflict with decisions in other Circuits which are cited below.

The District Court directed a verdict against Hallmark on its Section 2 claim solely on the ground that a "relevant market" had not been proven. (T. 3625.) However, later in the case the court conceded that the relevant market in this case was the prefabricated aluminum huts for Vietnam. (R. 714.) See also *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America,* 438 F.2d 1286, 1306 (5 Cir. 1971). The Court of Appeals also recognized this to be the relevant market. Thus, there

can be no doubt that Stanray was attempting to exclude Hallmark from the whole of the relevant market and possessed the economic power (or, at least, a dangerous probability) to do so. Compare: *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9 Cir. 1964); *Cornwell Quality Tools Co. v. C.T.S. Co., Inc.*, 446 F.2d 832 (9 Cir. 1971). Hence, the only issues were whether Stanray had an intent to monopolize the relevant market, and whether this intent was accompanied by predatory practices. The lengthy recitation of facts in the Statement of Facts, *supra*, establishes that Stanray was attempting to prevent suppliers from dealing with Hallmark. Stanray successfully urged both Reynolds and Harvey to refuse to finance Hallmark. Moreover, Mr. Warner and other Stanray representatives attempted to induce George Widman Co. (another Hallmark supplier) not to do business with the petitioner Hallmark. (T. 1083-1089.)

There is additional evidence of predatory acts by Stanray. Stanray threatened Hallmark's subcontractor that "if I had my druthers or if I had my way he would deal only with us", that is Stanray. (T. 1082-1084.) Even Stanray knew it was violating the law: Warner testified he

> "said it very definitely and dogmatically once, that this is the way I would prefer that the thing be handled. *But this is against the law,* you know.—The *restriction of trade* and so forth. . . ." (T. 1086.)

Warner testified that he told Widman: "You have got to respect a certain amount of business association with us and don't hurt us." (T. 1088, 89.) This was the same "problem, and I felt it was a very grave one, with

Reynolds . . . Someone had to be financing . . . Hallmark." (T. 1093-94.) Stanray told the Army that Hallmark was not financially able to perform (T. 1880); that Stanray doubted Hallmark had the technical ability (T. 1881, 85); and, that Hallmark officers used government loans to buy new cars. Stanray advised the government inspection team about unspecified "trade information—that is the chitchat and the—around the drinking fountain scuttlebutt" about Hallmark personnel. (T. 1147-49.) Stanray advised members of Congress that Hallmark was financially weak, never produced an aluminum building, and "there is some question as to whether they can staff their management adequately to successfully carry out this program." (T. 1115; P.Ex.41.) Stanray advised Harvey in the excluded documents found by the Court of Appeals to be harmless that:

> "Gibson thinks they will take another run at it and try to get Hallmark disqualified on basis of Hallmark's weak financial condition."
>
> "Gibson * * * (Stanray) thinks they stand good chance of taking 3000 aluminum building bid award from Hallmark in Patterson, California." (Pl.Ex.62 ID), dated May 12,1966.
>
> "Stanray very confident about their chances of knocking the Hallmark Company out of this." (Pl.Ex.63 ID), dated May 20, 1966.

The evidence was thus sufficient for the jury to conclude that Stanray violated Section 2 of the Sherman Act by virtue of its intent to exclude a competitor from "any part" of the market by "predatory" practices or "unfair means." *Lorain Journal Co. v. United States,* 342 U.S.

143 (1951); *Union Leader Corp. v. Newspaper of New England, Inc.*, 180 F.Supp. 125 (D. Mass. 1960).

In the classic and landmark case of *Standard Oil Co. of New Jersey v. United States*, 211 U.S. 1, 31 S.Ct. 502 (1910), Justice White pointed out that the scope of both Section 1 and Section 2 of the Sherman Act are as broad as the evils which they were enacted to prevent; and that together they accordingly reached all restrictions of trade or eliminations of competition, whether conspiratorially or unilaterally rooted, which at least in the long run produced or were likely to produce injury to the general public by way of enhancement of prices, deterioration of service, and the like. (See especially Justice White's analysis at 31 S.Ct. 502, pp. 511-516.)

Certiorari should be granted in this case to assure that Section 2 continues to have the vitality which this Court's decisions have given it.

III. THE EXCLUSION OF EVIDENCE RELATING TO HARVEY'S PARTICIPATION IN THE REYNOLDS-STANRAY COMBINATION WAS ERRONEOUS AND EXTREMELY PREJUDICIAL TO PETITIONER'S PROOF OF AN ANTITRUST VIOLATION.

The Shrank Reports which the District Court below erroneously refused to admit into evidence were extremely relevant and material in reflecting the involvement of Harvey with Stanray in the boycotting of Petitioner Hallmark. The Shrank Reports, particularly the May 27th document, in conjunction with the telephone conversation of that date between Parker (Harvey) and Whitt (Hallmark), connect Harvey and Reynolds to a concerted re-

fusal to deal with Hallmark in a plan developed and instigated by Stanray which acted as the intermediary between the two defendant suppliers.

The District Court's refusal to permit the admission of the Shrank Reports and the testimony thereon seriously prevented the petitioner from demonstrating the "full-picture" of the defendants' conspiratorial conduct, particularly the horizontal combination between two suppliers—Reynolds and Harvey—to boycott Hallmark.

The exclusion of the Shrank Reports and testimony related thereto was clear error. The documents contain the day-to-day involvement of the defendant Harvey in its business of selling aluminum. Harvey, like any corporation, does not transact business in a vacuum but instead is in constant contact with the business world to know what is happening and to be able to judge when, where, how, and to whom it will sell or attempt to sell its products. For these obvious reasons, Harvey's sales engineer was required by Harvey to file daily sales reports listing contacts and "any information that was pertinent to market conditions." (Shrank Depo. Ex. 12.)

These "Daily Sales Reports" by Shrank were admissible under 28 U.S.C. 1732, the Business Records rule, since Shrank was required by Harvey to make out these reports on a daily basis and in the regular course of business. *Bisno v. United States,* 299 F.2d 711, 718 (9th Cir. 1961); *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1958). As such, our case falls directly within the rule announced by the Sixth Circuit that, where a company has an established policy for employee reporting, such reports are admissible under 28 U.S.C. §1732(a).

Continental Baking Company v. United States, 281 F.2d 137 (6th Cir. 1960).

The documents were also admissible under Rule 43(a) of the Federal Rules of Civil Procedure which states in pertinent part:

> ". . . All evidence shall be admitted which is admissible under the statutes of the United States . . . , or under the rules of evidence applied in courts of general jurisdiction of the state in which the United States court is held. In any case, *the statute or rule which favors the reception of the evidence governs* and the evidence shall be presented according to the *most convenient method* prescribed in any of the statutes or rules to which reference is herein made." (Emphasis added.)

Under the California Evidence Code, applicable by virtue of Rule 43(a) the Shrank documents were admissible as admissions by defendant Stanray to Shrank evidencing Stanray's specific intent to eliminate Hallmark by taking "another run at it and try to get Hallmark disqualified", "taking 3,000 aluminum building bid award from Hallmark", and "knocking the Hallmark Company out of this." Moreover, the documents were admissible as declarations made in the course of a conspiracy, and in furtherance of its objectives, since the two defendants involved, Stanray and Harvey, were working together and these documents contain admissions to acquiesce in and later to join a conspiracy to eliminate Hallmark. For these and other reasons, the Shrank Reports were clearly admissible under California law. See Cal. Evid. Code §§785, 1101(b), 1223, 1224, 1230, 1235, 1236, 1237, 1240, 1241, 1250.

The Court of Appeals avoided the issue of admissibility and again invaded the province of the jury by ruling that even if the Shrank Reports had been admitted at trial, the evidence of Harvey's participation in the combination would not have been sufficient to support a verdict.

This Court must not permit such an interference with the functioning of antitrust juries. It is beyond question that the Shrank Reports would have demonstrated Harvey's knowledge of the Stanray-Reynolds conspiracy and its acquiescence and subsequent joining in the combination to boycott Hallmark. The evidence would also have shown Harvey's strong motive to favor Stanray as against Hallmark. If the excluded evidence had been admitted the jury would have had before it the continued combination of Harvey with Stanray and the pre-disposition of Harvey to join the conspiracy. Instead, the jury was given only one item of evidence of Harvey's participation in the anticompetitive scheme, one meeting which the plaintiff was forced to present in a vacuum.

By the exclusion of this compelling evidence, Hallmark was forced to compartmentalize the Harvey-Stanray relationship and treat Harvey's involvement separately and not in the total picture of the overall conspiracy to eliminate Hallmark. See *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

IV. THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO PETITIONER HALLMARK, CLEARLY ESTABLISHES THAT THE CONCERTED ACTION OF REYNOLDS AND STANRAY VIOLATED SECTION 1 OF THE SHERMAN ACT (15 U.S.C. §1).

As previously stated, there was presented during trial clear evidence of a conspiracy or combination between Reynolds and Stanray concerning the latter's attempt to secure the government contract for 3,000 aluminum huts to be used in Vietnam. This consisted of numerous communications between Reynolds and Stanray personnel dating back to January, 1966 in which these two parties agreed to promote the "aluminum hut" project. When the government requested bids in April, 1966, Reynolds submitted a highly inflated bid. There was evidence that Stanray was "upset", indeed, "livid" about Reynolds' submission of a bid, thus evidencing the prior agreement between the two defendants that Reynolds would aid Stanray.

After Hallmark came in with the low bid, Stanray's efforts were directed at eliminating Hallmark from the market. Stanray approached Hallmark's prospective suppliers and urged them not to do business with Hallmark. When Stanray learned that Reynolds would finance Hallmark through an escrow arrangement, it "complained" to Reynolds and received "assurances" from Reynolds' President that Hallmark would not receive financing. Reynolds then immediately demanded a letter of credit from Hallmark in the amount of nearly $2,000,000. This evidence alone supports the jury's finding of conspiracy.

Moreover, the conspiracy was in clear violation of Section 1 of the Sherman Act for numerous reasons: (1)

The conspiracy between Reynolds and Stanray was originated and pursued in order to implement a bid-rigging (price-fixing) scheme between two competing bidders (Stanray and Reynolds) which is illegal *per se;* (2) the combination was intended to boycott and eliminate a price-cutting competitor of at least one party to the combination and is, therefore, illegal under Section 1. *United States v. Klearflax Linen Looms, Inc.,* 63 F.Supp. 32 (1945); *Girardi v. Gates Rubber Co.,* 325 F.2d 196 (9 Cir. 1963); *Premier Electrical Construction Co., Inc. v. Miller Davis Co.,* 422 F.2d 1132 (1970); *Albrecht v. The Herald Co.,* 390 U.S. 145 (1968).

The rulings below erroneously construe Section 1 of the Sherman Act and jeopardize its effectiveness in preventing and redressing injuries caused by anticompetitive conduct.

V. THE DECISION OF THE DISTRICT COURT BELOW ON THE ISSUE OF INJURY TO PETITIONER HALLMARK UNDERMINES THIS COURT'S LANDMARK RULING IN HANOVER SHOE, INC. v. UNITED SHOE MACHINERY CORP., 392 U.S. 481 (1968).

Once it is recognized that the evidence in the record was sufficient to support the jury's finding of a Reynolds-Stanray conspiracy, it follows that the conspiratorial conduct violated Section 1 of the Sherman Act and caused injury and damage to petitioner Hallmark.

The District Court erred in two respects concerning the issue of the economic loss suffered by Hallmark. First, the Court erroneously invaded the province of the jury in determining the factual issue as to whether the govern-

ment contract absolutely limited the profits which Hallmark could have realized despite any reduction in costs. Not only is it entirely for the jury to make such determinations of fact, but more importantly there is not one shred of evidence in support of the Court's conclusion. Secondly, the Court erred in holding as a matter of law that since the contract limited profits to 11%—a "fact" we vigorously dispute—Hallmark, in paying a higher price for its aluminum supply, suffered no legally recognizable injury. As this Court has already ruled in the case *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), such "passing on" is no defense to violations such as those alleged here. Far from being unable to provide proof that the acts of defendants caused it damages, Hallmark introduced ample evidence to support the jury finding of injury. The jury found, based upon the evidence, that as a result of defendants' anticompetitive conduct, Hallmark was compelled to pay more for the aluminum it purchased than it would have paid absent the conspiracy.

Indeed, the jury could have—and, obviously, did find that in the absence of the Reynolds-Stanray conspiracy, Hallmark would have been able to purchase the aluminum needed for the project from Reynolds at a fair and competitive price of approximately $1,400,000. However, by reason of the illegal conspiracy between the defendant-appellees herein, Hallmark was required to pay Ador-Hilite $1,982,342.15 for the aluminum (plus an additional amount of approximately $145,000 in increased costs for the doors and windows charged by Ador-Hilite under the new contract). (Pl. Ex. 18; Pl. Ex. 23; and especially see Pl. Ex. 28(d).)

Inasmuch as the existence of the illegal conspiracy caused Hallmark to pay more for the aluminum than the fair and competitive price would have been, Hallmark's right to recover the difference in price under Section 4 of the Clayton Act (15 U.S.C. §15) directly follows under the *Hanover Shoe* ruling and the earlier cases on which that decision is based. As Mr. Justice White observed in *Hanover Shoe* (392 U.S. at p. 489):

> "We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge *he has made out a prima facie case of injury and damage within the meaning of §4.*" (Emphasis added.)

In our case, the jury found that the Reynolds-Stanray conspiracy precluded Hallmark from paying a fair price and forced it to purchase the aluminum from Ador-Hilite at a higher price.

> ". . . when Hanover had been forced to pay excessive prices for machinery leased from United, it had suffered legal injury: 'This excessive price is the injury.'" (392 U.S. at p. 488, note 6.)

The language and logic of the Second Circuit in its landmark decision, *Straus v. Victor Talking Machine Co.*, 297 Fed. 791, 803 (2d Cir. 1924) is dispositive of our present case:

> "The jury must have so found. *Plaintiffs were compelled to pay more than this reasonable price.* Why? Manifestly *because the illegal combination forced them so to do in order to carry on the requirements of their business. Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial* in

> this case. They were entitled to goods at the reasonable price thereof. Through no legal fault of theirs, but because of defendants' wrong, they were deprived of their right, and *the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay* . . . It is thus unnecessary to 'go beyond' this 'first step'." (Emphasis added.)

In our case as in *Hanover Shoe,* the plaintiff was precluded from paying a fair and competitive price as a result of the illegal anticompetitive conduct of defendants. In our case as in *Hanover Shoe,* the plaintiff ultimately paid a higher price for the product involved than it would have paid in the absence of the defendants' illegality. In our case as in *Hanover Shoe,* the payment by plaintiff of this higher or "excessive" price establishes ". . . a *prima facie* case of injury and damage within the meaning of §4."

Thus, Hallmark suffered legal injury when it contracted for and paid the higher price for aluminum to Ador-Hilite after the Reynolds-Stanray conspiracy prevented Hallmark from obtaining the aluminum supply at the lower price. As this Court ruled in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531, 533-34 (1918) (reaffirmed in *Hanover Shoe, supra,* 392 U.S. at p. 490, note 8):

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step . . . The plaintiffs suffered losses to the amount of the verdict *when they paid. Their claim accrued at once* . . ." (Emphasis added.)

To the same effect: *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906); *Adams v. Mills*, 286 U.S. 397 (1932).

Of these decisions and others cited in its *Hanover Shoe* opinion this Court stated:

> "In those cases, the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages." (392 U.S. at p. 490.)

The ruling below ignores these cases and the long-standing view that payment of a higher price in itself establishes *prima facie* injury, and instead attempts, superficially, to distinguish *Hanover Shoe* on the ground that the contract price paid by the Government to Hallmark was based on the higher Ador-Hilite price for aluminum and that the contract strictly limited Hallmark's profit to 11%. The Court below attempted to bring this case within the dicta in *Hanover Shoe* (392 U.S. at p. 494):

> "We recognize that there might be situations—for instance where an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged . . ."

The above quoted language from *Hanover Shoe* is wholly inapplicable to our present case for several reasons.

First. There was no "pre-existing cost-plus contract" between Hallmark and the Government at the time plaintiff was injured by the overcharge. Defendants seem to concede this. They recognize that prior to negotiating the

amount of profit which the Government thought appropriate, the Government desired that Hallmark's costs be specified. The amount of Hallmark's anticipated profit was negotiated in light of these costs.

The improper assumption which the District Court and the defendants make is that Hallmark's profit would have been established at 11% irrespective of the costs. This unwarranted assumption *of fact* was not accepted by the jury. Moreover it involves the kind of speculation which the Supreme Court expressly rejected as a matter *of law* in disallowing the "passing-on" defense in *Hanover Shoe* (392 U.S. at pp. 491-493.)

Since the defendants were attempting to establish the passing-on defense, the burden was upon them, under *Hanover Shoe,* to negate the element of speculation and to counter Hallmark's *prima facie* showing of injury as a result of payment of an excessive price for the aluminum. The defendants failed completely in this regard.

Second. The 11% figure was not a strict limitation on petitioner Hallmark's profit. Defendants, in their brief on appeal (p. 44), conceded that the 11% profit margin was not strict and indeed was not even adhered to in this case. In defendants' own words (Brief, p. 44):

> "The permissible net profit of $453,180, or 11% of allowable costs was incorporated into this contract. As the contract was performed, plaintiff actually received a profit in excess of this amount."

Thus, there was nothing magic or binding about the 11% figure. It was not a "pre-existing" profit margin fixed by the Government. The jury could have reasonably

found (and, presumably, did find) that the Government would have allowed for more than 11% profit, especially if the underlying sub-contractor costs (and hence the contract price) were lower, as they should have been.

Third. To the extent that there existed questions of fact concerning the nature of the contract and flexibility in the profit to be allowed, the issues were submitted to the jury and the verdict reflects their findings in plaintiff's favor.

In fact, this issue should not have been submitted to the jury. Under *Hanover Shoe,* defendants' "passing-on" contention should have been rejected as a matter of law. The District Court should have recognized that our case did not involve a preexisting cost-plus contract, and that the 11% profit margin was not a strict limitation on Hallmark's profit potential. Thus, the injury to Hallmark was established as a matter of law.

Nevertheless, the District Court—at defendants' request—submitted the issue to the jury, instructing as follows:

> "If you find, in support of defendant's contentions, that any lower prices plaintiff might have obtained from Harvey or Reynolds would have been directly taken into account in determining the contract price between plaintiff and the government for the hut contract, *you may take this into consideration in determining whether and to what extent* plaintiff may have actually been damaged. (T. 3844-3845. Emphasis added.)

The issue was argued before the jury by plaintiff's and defendants' counsel. The jury's verdict clearly reflects the factual finding that, had Hallmark's costs been

lower it could have derived a greater profit from the aluminum hut project; also, the verdict establishes the fact that Hallmark's profits were *not* strictly limited to 11% of the costs of the project.

In the face of these factual determinations, even the case of *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3rd Cir. 1962) on which defendants so heavily relied (Def. Br., p. 48), supports Hallmark's position. In *Freedman* as in our case, the issue of injury (in a "passing-on" situation) was submitted to and argued before the jury. The jury found that the *Freedman* plaintiffs had not been injured. As the Court of Appeals *observed* (301 F.2d at p. 832):

> "... there was evidence from which the jury could reasonably conclude that plaintiffs passed on to their clients and customers the amount of the terminal charges and that the charges did not result in a reduction in the volume of plaintiffs' business."

Plaintiff Hallmark requests that the jury's finding in our case be accorded the same respect as was given the verdict in *Freedman*. Thus, whether this Court chooses to follow the 1962 Third Circuit decision in *Freedman* or the 1969 Supreme Court ruling in *Hanover Shoe*, the result must be the same—Hallmark has established as a matter of fact (*Freedman*) and as a matter of law (*Hanover Shoe*) that it was required to pay a higher price for aluminum because of defendants' illegal, anti-competitive conduct and that its profits were diminished as a result thereof. This difference in price, then, establishes the *fact* and the approximate *amount* of the injury and damages suffered by Hallmark.

VI. THE ACTION BY THE COURT BELOW, IN PERMITTING RESPONDENTS TO FILE MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL MORE THAN TEN (10) DAYS AFTER ENTRY OF JUDGMENT ON THE JURY'S VERDICT, FRUSTRATES IMPORTANT POLICIES RELATING TO FINALITY OF JUDGMENTS AND THE RIGHT TO TRIAL BY JURY IN FEDERAL ANTITRUST ACTIONS.

This Court has spoken quite harshly, and properly so, of the use of summary procedures by District Judges to dispose of civil antitrust claims under Section 4 of the Clayton Act. (15 U.S.C. §15.) *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500-505 (1969); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 703-704 (1969); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). The essence of these rulings is that, in appraising the anticompetitive nature of business practices and the existence of illegal conspiratorial behavior, the expertise of the jury is indispensable.

The relevance of these cases here is that, while summary procedures and judgments notwithstanding the verdict are allowed in federal litigation, they are disfavored when utilized to preempt or vitiate the function of a jury in an antitrust case.

In this light, it seems clear that the availability of judgments notwithstanding the verdict under Rule 50(b) must be restricted. Rule 50(b), therefore, must be narrowly and strictly construed, particularly with respect to the ten (10) day limitation period for the filing of such motions seeking to overturn the jury's verdict.

Inasmuch as the grant of judgment notwithstanding the verdict is in derogation of the right to trial by jury, important federal constitutional and procedural policies

require that this Court establish strict ground rules for parties, such as Reynolds and Stanray herein, who seek to vitiate the jury's determination. This alone would warrant the granting of Hallmark's petition for a writ of certiorari here.

In our present case, the jury—after approximately eight weeks of trial and six days of deliberation—returned a verdict in favor of petitioner Hallmark on June 24, 1970. The District Court with all counsel present, ordered that judgment be entered. The Clerk immediately made an appropriate notation on the verdict form and signed it. All parties were present (i.e., represented by counsel) and received full and unequivocal notice of the immediate entry of judgment. Even so, to make his action crystal clear, the trial judge read Rule 50(b) *verbatim* to counsel for Reynolds and Stanray, and then stated:

> "The judgment has been entered as of today. So, the 10 days will start running today." (R.T. 3964.)

The meaning and effect of the above acts and words are clear. Judgment was entered. The jury verdict form was the judgment. The Clerk then immediately filed that document and made the two appropriate entries in the civil docket, one of which was a detailed and complete entry of the terms and substance of the judgment. Only the word "judgment" was omitted.

Thus, if under Rule 50(b), the ten (10) day time limit for filing motions started running as of June 24, 1970, how could the District Court properly entertain and act upon a motion filed fifteen (15) days later—July 9, 1970?

The courts below determined that, notwithstanding the complete and unequivocal entry of judgment on June 24,

1970, the period for filing motions under Rules 50(b) and 59 did not begin to run until June 29, 1970 when a document designated "Judgment" was filed. Under the facts of our case, this was clearly erroneous by virtue of this Court's opinion in *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958):

> "And as correctly held by the Court of Appeals, *the later filing and entry of a more formal judgment could not constitute a second final judgment* in the case nor extend the time of appeal." (Emphasis added.)

The decisions of the courts below in our case thus raise important issues dealing with the finality of federal judgments. They liberalize the availability of relief under Rules 50(b) and 59, even though such relief is necessarily in derogation of the right to trial by jury as articulated in the Seventh Amendment to the Constitution of the United States. Finally, the decisions below ignore this Court's definition of final judgment as stated in the *Schaefer Brewing* case. As Mr. Justice Harlan stated in his dissenting opinion in that case (356 U.S. at 251):

> "The Court's opinion, and the dissent of Mr. Justice Frankfurter which I have joined, are at one on the basic issue, namely, that *entry of a formal judgment is not necessary to start the time for appeal running*, and also agree that the determinative question in any given case is whether the District Court intended its decision on the merits to be a final disposition of the matter." (Emphasis added.)

In our case, the language of the trial judge, clerk and parties clearly reflected the intent and understanding that

judgment was pronounced as of June 24, 1966 immediately after the jury brought in its verdict. The action of the clerk in further preparing, signing and entering that form satisfied Rule 58. All parties had notice of the entry of judgment on June 24th, and were specifically and expressly informed that the ten day period for filing of the motions here in issue had started to run as of that date. Finally, the Clerk's separate entry in the civil docket of the substance of the verdict and judgment constituted a complete and unambiguous determination of the rights and liabilities of all the parties. It is also clear that nothing was left open or undone; no subsequent action by the Court was intended or implied. Thus, on June 24th, everything being completed, a hearing date was set for argument on the post-judgment motions. The subsequent "judgment" form and docket entry added nothing to the previous document and entry but the superfluous word "judgment".

Therefore, according to the record in our case, the verdict was returned and the judgment was entered on the same day, June 24, 1970. The motions for judgment notwithstanding the verdict and the new trial, filed 15 days later, were not timely. It is clear that the ten day period for filing motions under Rules 50(b) and 59 is strict and jurisdictional. In *Weir v. United States,* 339 F.2d 82, 83 (8th Cir., 1964) the Court stated:

> "If a motion for new trial is not served within the time prescribed by Rule 59(b) supra, it is too late and cannot be granted by the District Court. *Cf. Chicago & N.W. Ry. Co. v. Britten,* 301 F.2d 400 (8 Cir. 1962). A District Court is powerless to enlarge the period of time required for the service of

such a motion. *Nugent v. Yellow Cab Co., Corp.*, 295 F.2d 794 (7 Cir. 1961); *Federal Deposit Ins. Corp. v. Alker, et al.*, 234 F.2d 113 (3 Cir. 1956)."

Similarly, the ten day period for motions for judgment notwithstanding the verdict under Rule 50(b) is jurisdictional. Failure to file such motions on time precludes the granting of the relief sought. *Hulson v. Atchison T. & S.F. Ry. Co.*, 27 FRD 280, appeal dismissed in part and affirmed in part, 289 F.2d 726, cert. denied 368 U.S. 835. Under these rulings, there is no power or discretion in the District Court to enlarge the time allowed or to permit a waiver of the strict ten-day time limit. Nor may relief be permitted under Rules 6 or 60(b).

As the court stated in *Draper v. Erie Ry. Co.*, 183 F.Supp. 899 (W.D. Pa. 1960), the ten-day period " . . . is mandatory and leaves no discretion with the trial judge." (Citing *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)).

As suggested above, this strict approach is necessary because the relief sought under such motions, if granted, would necessarily prolong litigation and encourage duplicative trials, which here would be in derogation of a jury verdict rendered after a lengthy and complex trial. Courts must be very strict in holding parties to the express and specific time limitations which apply to Rules 50(b) and 59. Therefore, this Court should grant review in our case to reaffirm this clear federal policy.

VII. THE DISTRICT COURT'S ALTERNATIVE GRANT OF A NEW TRIAL WAS IMPROPER

The District Court's alternative grant of a new trial was supported by the identical grounds relied upon for the grant of judgment N.O.V. Numerous cases have established that if the entry of judgment notwithstanding the verdict is ruled improper, then the alternative grant of new trial should also be reversed. *Lewin v. Metropolitan Life Ins. Co.*, 395 F.2d 608, 614-615 (3 Cir. 1968); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3 Cir. 1960).

Moreover, where—as in our case—the verdict is not the product of prejudicially admitted or excluded evidence, or erroneous instructions, and the evidence was sufficient to go to the jury, the granting of a new trial is particularly inappropriate (*O'Neil v. W. R. Grace & Co.*, 410 F.2d 908 (5 Cir. 1969)). In our case, neither Stanray nor Reynolds offered any significant objection to the evidence or instructions presented in the Court below. As stated in previous sections of this brief, *supra*, the District Court's rulings on the evidence and instructions were generally favorable to all the defendants, Stanray, Reynolds and Harvey. A new trial would involve merely a replay or duplication of our present record. The expense and delay, as well as the burden on already crowded court calendars, would be overwhelming. Under the *O'Neil* decision, the verdict for Hallmark should be ordered reinstated.

In *Neely v. Eby Construction Co.*, 386 U.S. 317, 323 (1967), this Court approved of the statement of the Advisory Committee that " . . . the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial

and direct that judgment be entered on the verdict." The Court also approvingly cited *Lind v. Schenley Industries, Inc., supra.*

In a recent antitrust case, *Perkins v. Standard Oil Company of California,* 395 U.S. 642 (1969), this Court reversed the lower court's order granting a new trial (395 U.S. at p. 644) and ruled that the " . . . jury's verdict and judgment should be reinstated. It is so ordered. Verdict and judgment reinstated." (395 U.S. at p. 650). Our present case is an appropriate one for reversal of the grants of judgment n.o.v. and new trial and reinstatement of the verdict of the jury.

CONCLUSION

For all of the foregoing reasons, Hallmark's Petition for Writ of Certiorari should be granted.

Dated April 10, 1974.

Respectfully submitted,

LAW OFFICES OF JOSEPH L. ALIOTO,
JOSEPH L. ALIOTO,
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Counsel for Petitioner.

(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. 47,044 RFP

Hallmark Industry,
Plaintiff,
vs.
Reynolds Metals Company, et al.,
Defendants.

MEMORANDUM AND ORDER

This action was brought by plaintiff Hallmark Industry against defendants Reynolds Metals Company, Stanray Pacific Corporation and Harvey Aluminum, charging violation of Sections One and Two of the Sherman Act. 15 U.S.C. §§ 1, 2. The basic claim of the suit was that Stanray conspired with Reynolds and Harvey to prevent Hallmark from obtaining aluminum supplies necessary to Hallmark's successful competition for a prefabricated hut contract with the United States government.

The case was tried before a jury, and after lengthy deliberation, the jury returned a verdict against defendants Reynolds and Stanray in the amount of $211,800, an amount which, if it stands, will result in a judgment in favor of plaintiff for $635,400, plus an attorney's fee.

Following the jury's verdict, defendants Reynolds and Stanray moved this Court, pursuant to Fed. Rules Civ. Proc. 50(b) and 59, to enter a judgment for defendants notwithstanding the verdict, and, in the alternative, for a new trial. The parties were given ample time to file briefs on the motions, and extensive written and oral arguments were presented to this Court.

Having given this matter lengthy consideration, this Court finds that defendants' motion for a judgment notwithstanding the verdict should be granted on three independent grounds.

I. A Conspiracy Was Not Proven.

The standards applicable to defendants' motion for judgment notwithstanding the verdict are generally the same as those controlling motions for directed verdict [5 *Moore's Federal Practice,* Para. 50.07 (1969)], and were clearly stated in *Independent Iron Works v. United States Steel Corp.,* 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd.,* 322 P.2d 656 (9th Cir. 1963), *cert denied,* 375 U.S. 922 (1963).

> . . . plaintiff is entitled to and it must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a prima facie case. He must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.

The essential inquiry on the conspiracy issue is whether Reynolds' decision to request a $1.9 million letter of credit from plaintiff Hallmark Industry was the result

of an agreement or rather the result of some non-conspiratorial motive.

The jury did not have to believe the testimony of Hall, Fox, Kibbey, or of any other witness for defendants Reynolds and Stanray. Mere disbelief, however, does not in and of itself, rise to the level of positive proof in the absence of other competent evidence suggesting alternative possibilities. *Dyer v. MacDougall,* 201 F.2d 265 (2d Cir. 1952); *Davis v. National Mortgagee Corp.,* 349 F.2d 175 (2d Cir. 1965). Of course, conspiracy is inherently difficult to prove except for the case in which one or more of the alleged conspirators are willing to testify against the defendants. Thus, courts will allow the jury to draw reasonable inferences from the facts before them. *Continental Baking Company v. United States,* 281 F.2d 137 (6th Cir. 1960); *Flintkote Company v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957).

In this case, the jury had before them the following facts: (1) Reynolds had actively aided Hallmark in the preparation of its bid for a government contract; (2) Reynolds had also been working with Stanray in the development of its plans for this contract; (3) Stanray became aware of Reynolds efforts to aid Hallmark and contacted Reynolds to ascertain the nature and extent of these efforts; (4) Reynolds demanded of Hallmark a letter of credit for the full price of the prospective supply contract.

Assuming, firstly, that the letter of credit demand was unreasonable and assuming, secondly, that Reynolds stood to benefit from its refusal to supply Hallmark, this

together with the facts listed above would provide a sufficient basis for the jury to reasonably infer that a conspiracy did exist between Reynolds and Stanray. See *Continental Baking Co., supra; Flintkote Company, supra.*

The conspiracy issue thus turns on two points: (1) whether Reynolds' credit terms were unreasonable, and (2), whether Reynolds stood to benefit by refusing Hallmark's aluminum order. The matter of the reasonableness of the letter of credit demand was the subject of testimony at trial. Witnesses for the defendants testified that the credit demand was reasonable, and the plaintiff did little, if anything, to controvert this testimony. None of the parties introduced independent expert testimony as to the appropriateness of the letter of credit. Defendants argue that the wisdom of Reynolds' credit decision is not an issue because it is a matter of business judgment, relying on *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors,* 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). However, it is not the wisdom of this credit decision that is being challenged in the present case, but rather the motive underlying the credit demand.

The evidence presented at trial indicates no reason why Reynolds would favor Stanray over Hallmark. Had credit arrangements been resolved with Hallmark, Reynolds would have obtained a contract for $1,900,000, which plaintiff, throughout the trial, maintained would have given Reynolds a high profit. While Stanray may well have hoped that Hallmark would be unable to obtain aluminum, there is no reason to think that Reynolds would give up a substantial order and profit at the

request of Stanray when Reynolds itself would not have benefited. The unreasonableness of such action by Reynolds is further underscored by the fact that Reynolds could not have expected that its refusal to sell to Hallmark would result in the government awarding the contract to Stanray. There were at least two companies, Harvey Aluminum and Ador-Hilite, and probably others, who could supply Hallmark's aluminum needs. Ador-Hilite, in fact, did supply them.

In light of this record, the decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), is particularly in point. In that case, plaintff claimed a conspiracy to boycott its sales of Iranian oil. The Supreme Court stated that if there was no evidence of an honest business motive for Cities Service's decision, a jury question might be presented as to Cities Service's reasons for refusing to deal with the plaintiff. However, there was such evidence: Cities Service feared dealing with the plaintiff because of possible unpleasant business consequences, including litigation, and there was no benefit to be gained by Cities Service in refusing to deal with the plaintiff. The inference for which the plaintiff contended was thus contradicted by evidence of non-conspiratorial motives; no advantage to Cities Service from refusing to deal with the plaintiff was proven. Accordingly the court held that the case should not be submitted to the jury, and ordered summary judgment for the defendant.

In the present case, Hallmark's financial position of near insolvency certainly indicated a non-conspiratorial motive on Reynolds' part for demanding reliable security

on the supply contract. In Reynolds' judgment, a letter of credit for the full contract price was necessary. This fact, when viewed together with the fact of the non-existence of any benefit to be gained by Reynolds in refusing to deal with Hallmark, leads inevitably to the conclusion that, as a matter of law, the jury could not have properly drawn an inference from the circumstances and terms of the letter of credit demand that the security requirement was the product of a conspiratorial arrangement between Reynolds and Stanray.

II. There Was No Prima Facie Evidence That The Acts Of The Defendants Caused Damage To The Plaintiff.

Plaintiff has the burden of proving that it suffered injury as a proximate result of defendants' Sherman Act violations. Furthermore, the fact of injury must be established with certainty. *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264-65 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931); *Flintkote Co. v. Lysfjord, supra.* In the present case, plaintiff was required to demonstrate that the allegedly illegal acts of defendants cause plaintiff legally cognizable injury with respect to the aluminum hut contract. This, plaintiff did not, and indeed, could not, do.

The facts with regard to this argument may be briefly stated. The government contract that was the subject of this lawsuit was a negotiated contract under which, by law, the plaintiff-contractor was required fully, completely, and accurately to disclose to the government its estimated costs for performing this work before a contract could be executed. 10 U.S.C.A. § 2306(f). The con-

tract price then was determined, by agreement between the parties, by adding to these costs an 11% profit.

As required, plaintiff did submit such cost information to the government on the prescribed form DD 633. Although the form DD 633 carried the typewritten date of May 13, 1966, Mr. Whitt testified that he did not sign it until May 27, 1966, and the form, as transmitted to the government, contained the handwritten date of May 27.[1] As the testimony indicated, on the date he signed this form, Mr. Whitt was negotiating for aluminum with Harvey Aluminum and Ador-Hilite, either of whom were a part of any conspiracy in this case. Furthermore, on this same date plaintiff selected and made arrangements to purchase its final source of aluminum from Ador-Hilite.

It was plaintiff's claim in this case that had defendant Reynolds agreed on May 13, 1966, to furnish aluminum to the plaintiff for the contract under the escrow, plaintiff's actual cost for performance of the contract would have been less. Such reduced subcontract costs, of course, would doubtless have been known to plaintiff prior to May 27, certainly before the contract was executed on

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[1]As a matter of objective intent, Mr. Whitt's dated signature on May 27 communicated to the government that he was making a representation on that date. Because this was an essential contracting document in this transaction intending to communicate required cost information, it seems clear that Whitt by his own act caused that document to speak as of the date of signature. (Corbin, *Contracts* § 548). Furthermore, the duty of the contractor to provide accurate cost information to the government does not end with the submission of a DD 633 but rather requires the contractor to communicate any later significant information of which the contractor becomes aware between the time he makes his original disclosure and the actual contract signing. ASPR 32 C.F.R. § 3.807.4.

June 6, 1966. As a matter of law, plaintiff would have been required to divulge them to the government (10 U.S.C.A. § 2306(f); 32 C.F.R. § 3.807.4), and this in turn would have resulted in a reduction of the contract price so that it would not exceed the 11% profit rate on which the plaintiff and government had agreed. This reduction would have occurred as a part of the negotiations and required cost disclosure procedure leading to the contract execution; indeed, the plaintiff would not lawfully have been able to enter into a fully binding contractual relationship without full and frank disclosure. 10 U.S.C.A. § 2306(f). The procedure referred to above is to be distinguished from renegotiation which results in the recovery of excess profits due to cost changes occurring *subsequent* to the execution of the contract.

In summary, had plaintiff been able to enter into the allegedly advantageous subcontract arrangement with Reynolds, no cost saving, and thus no profit increase, could have been realized by plaintiff. As set forth above, plaintiff has suffered no legally recognizable injury on this contract; consequently, plaintiff has been unable to provide proof that the alleged agreement between the defendants caused it damages.

III. Section 1 of the Sherman Act Was Not Violated.

For many years the Sherman Act has been construed by the courts as prohibiting only those contracts or combinations which "unreasonably" restrain trade. *Standard Oil Co. v. United States,* 221 U.S. 1 (1911); *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918). From this standard a rule of *per se* unreasonableness has evolved in certain situations. Practices which

the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940); division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899); tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392 (1947); and group boycotts, *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

Price fixing, territorial allocation, and tying arrangements are not contended by plaintiff to be involved herein, and there is no evidence in the record of such *per se* illegal activities. Furthermore, Reynolds and Stanray are not competitors with respect to the matters in controversy. Although plaintiff contends that they are in competition due to the fact that both submitted bids on the government contract for aluminum huts, plaintiff admitted that Reynolds' bid, at the very most, could only have been termed a complimentary or courtesy bid. It is obvious that, considering substance rather than form, Reynolds was in no way a true competitor of Stanray. The jury's acquittal of Harvey leaves as defendants only a supplier (Reynolds) and a customer, (Stanray), thus negating the possibility of a horizontal group boycott.

Accordingly, the alleged agreement between Reynolds and Stanray would not be illegal under Section 1 of the Sherman Act unless the record in this case shows that its effect was a substantial restriction upon the competitive conditions in the relevant industry. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957); *Susser v.*

Carvel Corp., 332 F.2d 505, 517 (2d Cir. 1965). In other words, plaintiff had the burden of proving that the alleged Reynolds-Stanray agreement substantially and adversely affected competition in the relevant market for prefabricated aluminum buildings in Viet-Nam.

Plaintiff failed to establish this at the trial. The record is barren of evidence that the alleged agreement between Reynolds and Stanray appreciably damaged the competitive structure or substantially restricted competitive forces generally in the market for prefabricated aluminum buildings in Viet-Nam. In the absence of such a showing of harm, this Court is compelled as a matter of law to find that there was no violation of Section 1 of the Sherman Act and to grant defendants' motion for j.n.o.v. See *Richardson v. Chrysler Motors Corp.*, 257 F. Supp. 547 (S.D.Tex. 1966); *Fedderson Motors v. Ward*, 180 F.2d 519 (10th Cir. 1950).

Plaintiff must seek relief elsewhere than under Section 1 of the Sherman Act because he has not proven that defendants' conduct resulted in an undue limitation upon competitive conditions in the industry. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D.Md. 1956), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956). Indeed, if the jury verdict in this case were allowed to stand, the economic and legal consequences would be disturbing. Actions for ordinary business tort would become federalized regardless of whether competition was appreciably affected. Any plaintiff claiming harm from the common law tort of interference with business relations would be lured to the federal courts by the prospect of recovering treble his actual damages plus his attorney's fee. The

courts have consistently stated that such an application of the anti-trust laws would be contrary to the intent of Congress and the purpose of the Sherman Act. *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), *cert denied*, 374 U.S. 922 (1963); *Mackey v. Sears, Roebuck & Company*, 237 F.2d 869 (7th Cir. 1956), petition for cert. dismissed, 355 U.S. 865 (1957); *Hunt v. Crumboch*, 325 U.S. 821 (1945). This court will not disregard such authority.

MOTION FOR NEW TRIAL

Should this Court be reversed on its decision, as enunciated above, to grant defendants' motion for judgment notwithstanding the verdict, then it is just and proper that defendants' motion for a new trial be granted.

A motion for a new trial is addressed to the sound judicial discretion of the Court, and should be granted if it will do substantial justice. 6A *Moore's Federal Practice* § 59.05[5]. The trial judge has a responsibility to weigh the evidence and to set aside the jury's verdict, when, in his conscientious opinion, the verdict is contrary to the weight of the evidence. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1959).

This Court has conscientiously reviewed the testimony presented at trial and the applicable standards of law. For the reasons discussed above, which served as the basis for the granting of the judgment notwithstanding the verdict, this Court finds that for justice to be done, a new trial must be granted.

Defendants have raised other grounds in support of their motion for a new trial, but in light of the above,

it is unnecessary to rule on those contentions. Furthermore, since this Court has granted defendants' motion for judgment notwithstanding the verdict, it is unnecessary to act upon plaintiff's application for an attorney's fee.

It is hereby Ordered that defendants' motion for judgment notwithstanding the verdict be Granted, and in the alternative, that defendants' motion for a new trial be Granted should this Court's order for a judgment n.o.v. be reversed.

/s/ Robert F. Peckham
United States District Judge

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

Hallmark Industry, Appellant, vs. Reynolds Metals Company, et al., Appellees.	No. 71-1492
Hallmark Industry, Appellant, vs. Harvey Aluminum (Incorporated), Appellee.	No. 26729

[Filed Dec. 5, 1973]

Appeals from the United States District Court
for the Northern District of California.

Before: Judges HAMLIN and CHOY, Circuit Judges,
and SKOPIL,* District Judge.

SKOPIL, District Judge:

This is an antitrust suit for treble damages brought under Section 4 of the Clayton Act. 15 U.S.C. § 15. Appellant Hallmark Industry charged appellees Reynolds Metals Co., Stanray Pacific Co., and Harvey Aluminum,

*Honorable Otto R. Skopil, Jr., United States District Judge, District of Oregon, sitting by designation.

Inc. with violations of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1 and 2. Essentially, Hallmark's claim is that, after Hallmark bid successfully on a United States Army contract to supply prefabricated aluminum buildings for use in Vietnam, Stanray, Reynolds, and Harvey conspired to thwart Hallmark's efforts to obtain the necessary aluminum to perform the contract. Appellant also claims that Stanray attempted to monopolize the relevant market.

The case was tried by a jury. At the close of the evidence, defendants moved for a directed verdict on all issues. The trial judge directed a verdict for Stanray on the issue of its Section 2 attempt to monopolize; the remaining issues were given to the jury. The jury returned a verdict against Reynolds and Stanray for $211,800, which, when trebled, could result in a final judgment of $635,400. The jury found that Harvey was not a party to the conspiracy. Reynolds and Stanray then filed motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. Fed. R. Civ. P. 50(b) and 59. The trial court granted the motion for a judgment n.o.v. and, if that ruling were reversed on appeal, a new trial. Hallmark appeals from that ruling in No. 71-1492, and from the jury's verdict for Harvey in No. 26729. The cases were consolidated for hearing only. We affirm both.

Appellant again raises the issue of the District Court's lack of jurisdiction to entertain appellees' motions for judgment n.o.v. or for a new trial. The question was raised in this court previously and was denied. *Hallmark Industry v. Peckham*, No. 26915 (9th Cir., Feb. 11, 1971). We do not disturb that decision.

I

THE FACTS

Appellant Hallmark manufactures and sells prefabricated metal buildings. Appellee Stanray manufactures and sells a diverse line of fabricated metal products, including buildings. Appellees Harvey and Reynolds compete in manufacturing, distributing, and selling of aluminum products.

In January, 1966, Reynolds and Stanray met, apparently hoping to promote an aluminum hut project for governmental use. It is not clear that an actual agreement was reached, as appellant urges. In March, 1966, the Army requested bids on a contract for 3,000 aluminum huts for use in Vietnam. The contract specifications were general. Each bidder was to provide his own concept of an appropriate design, price, and delivery date.

In April, 1966, 26 companies submitted bids on the government contract, including Hallmark, Reynolds, and Stanray. Hallmark's bid, prepared for this contract, was the lowest. Stanray's bid, based on a design it had sold earlier to the Atomic Energy Commission, was the second lowest. Reynolds' bid proposed a design which was not acceptable to the Army. In May, 1966, Reynolds was notified its proposal was no longer under consideration.[1]

Stanray was annoyed by Reynolds' submission of a bid. Hallmark contends that this annoyance demonstrates

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[1]Appellants make much of the fact that the cost of the original bid prepared by Reynolds' engineer was raised substantially. However, the evidence was that one item, representing 12% of the entire bid, slated for a 100% increase, was reduced to a 50% increase. Even without this increase, it is unlikely that the Reynolds' bid would have been more competitive.

that Stanray and Reynolds had agreed, in January, to conspire to insure that Stanray received the Army contract, and that the Reynolds' bid was counter to the agreement. At the same time, Hallmark contends that the bid was part of a conspiracy to rig the bids and inflate the price paid by the government.

In addition to submitting a bid, Reynolds also began making contacts with potential awardees of the contract, hoping to supply the successful bidder with its aluminum requirements. In April, 1966, Reynolds' representatives met with Hallmark personnel to determine whether Reynolds could supply Hallmark, if Hallmark received the contract.

On May 9, 1966, Reynolds offered its services to Stanray, again hoping to supply Stanray with aluminum if it obtained the contract. Reynolds' engineers made a trip to Stanray's Los Angeles plant to see if Reynolds could supply Stanray's requirements. They determined that they could not. After leaving Stanray's plant, the Reynolds' engineers traveled to the Hallmark plant in Patterson, California. The Reynolds' representatives examined Hallmark's design and told Hallmark they could supply their aluminum needs for $1,900,000. Stanray heard about Reynolds' efforts to aid Hallmark and contacted Reynolds to learn the nature of those efforts.

After inspecting Hallmark's plant to determine its capability of fulfilling the contract, the government entered into final negotiations with Hallmark. Hallmark began making arrangements with suppliers to meet its raw materials requirements. Hallmark asked all suppliers to agree to a bank escrow, from which the suppliers would

be paid as the government paid for the buildings. Reynolds, however, insisted on a letter of credit for the full amount of the aluminum it was to supply. On May 13, 1966, Reynolds informed the Army of its intention to demand the full letter of credit. Hallmark attempted to find an alternate source of supply for aluminum. On May 23, 1966, Hallmark notified Reynolds that it did not intend to buy from Reynolds.

Hallmark contends that the $1.9 million letter of credit was the result of the Stanray-Reynolds conspiracy and was really a subterfuge for refusing to supply Hallmark. Reynolds, on the other hand, says that it decided that full security was necessary to insure payment by Hallmark. Hallmark had substantial debts, lacked working capital, had never made a profit, and had no unencumbered assets. Reynolds was unwilling to risk not getting paid and, therefore, demanded the letter of credit.

Meanwhile, Stanray was trying to remain in contention for the Army contract by working with the George C. Widman Co., another aluminum supplier, to reduce the price of its design to make it more attractive to the Army. Nevertheless, the Army decided to purchase from Hallmark.

Having failed to obtain their aluminum requirements from Reynolds on Hallmark's terms, appellant approached appellee Harvey. Harvey agreed to supply the aluminum for about $2,000,000, but it also requested a letter of credit for the full amount of the purchase. Appellant contends this demand was the result of a Reynolds-Stanray-Harvey conspiracy to secure the Army contract for Stanray. Hallmark finally obtained its aluminum

needs from Ador-Hilite, but for substantially more than the Reynolds or Harvey quotations. Ador-Hilite also furnished Hallmark with the necessary financing.

The final contract between Hallmark and the Army required complete and accurate disclosure of the estimated costs for the performance of the work. 10 U.S.C. § 2306(f); 32 C.F.R. § 3.807-3. On May 27, 1966, Hallmark's president signed and sent to the government Form DD 663 containing the cost disclosures. The contract was signed on June 6, 1966, for the total amount appearing on Form DD 663. The permissible net profit of 11% was allowed on that amount.[2]

II

THE DIRECTED VERDICT FOR STANRAY

We turn first to appellant's contention that the trial court erred in directing a verdict for Stanray on the issue of its alleged attempt to monopolize in violation of Section 2 of the Sherman Act. 15 U.S.C. §2. At the heart of the issue here is *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), later followed in *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344 (9th Cir. 1970), and *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 308, 332 (9th Cir. 1973). Appellant relies on *Lessig's* holding that "when the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" 327 F.2d at 474. In *Lessig*, Tidewater had argued that attempt to monopolize is established only if there is proof of "dangerous probability of success", relying on Justice Holmes' opin-

[2]Hallmark's final net profit actually exceeded 11%.

ion in *Swift & Co. v. United States,* 196 U.S. 375 (1905). Tidewater's contention was that such proof required an evaluation of its power in the relevant market. *Lessig* rejected the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. The court held that the "specific intent itself is the only evidence of dangerous probability the statute requires . . . ." 327 F.2d at 474.

This court has dealt with Section 2 attempt to monopolize claims several times since *Lessig.*

In *Cornwell Quality Tools Co. v. C.T.S. Co.,* 446 F.2d 825, 832 (9th Cir. 1971), Cornwell had terminated C.T.S.'s sole distributorship for California and Nevada and had opened its own distributorship. Vigorous competition ensued between Cornwell and C.T.S., which was then distributing the products of a competitor of Cornwell. Cornwell and C.T.S. each alleged restraints of trade by the other. On the issue of attempt to monopolize by Cornwell, this court held that the evidence and offer of proof on specific intent to monopolize was insufficient.[3]

In *Bushie v. Stenocord Corp.,* 460 F.2d 116 (9th Cir. 1972), Stenocord had terminated Bushie's distributorship

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[3]The *Cornwell* opinion states that to establish attempt to monopolize, C.T.S. had to prove "specific intent to monopolize *and* . . . sufficient market power to come dangerously close to success". 446 F.2d at 832 (emphasis added). This statement was offered as a restatement of the holding in *Swift & Co. v. United States,* 196 U.S. 375 (1905). As we pointed out in *Lessig,* however, *Swift* spoke of "intent and the *consequent* dangerous probability". 327 F.2d at 474 n.46 (emphasis added in *Lessig*). The *Cornwell* dictum cannot be read to require proof of any particular degree of market power as an independent and necessary element of attempt to monopolize, for such a requirement would be contrary to the holding in *Lessig,* more recently reaffirmed in *Industrial Building Materials, supra,* and *Moore, supra.*

contract and had begun selling through its own outlet exclusively. With respect to his claim of attempt to monopolize, Bushie contended that *Lessig* and *Industrial Building Materials, supra,* supported his position that intent was the sole essential element and that no proof of Stenocord's power to monopolize the market was required. We distinguished both cases, finding that the attempted monopolization claims there were founded upon "a substantial claim of restraint of trade, from which we indicated the specific intent required for a claim of attempt to monopolize could be inferred". 460 F.2d at 121. Bushie had failed to lay such a foundation.

Finally, in *Moore v. Jas. H. Matthews & Co.,* 473 F.2d 328, *supra,* a cemetery monument dealer sued several cemeteries and a grave marker manufacturer, charging monopolization, attempts to monopolize, and restraints of trade. This court reversed summary judgment for the defendants. With regard to the claim of attempt to monopolize, the court reiterated the *Lessig* rule that proof of monopoly power is not required. 473 F.2d at 332.

Nonetheless, appellees in this case argue that dangerous probability must be shown through evidence of sufficient market power. Certainly market power may establish dangerous probability. However, *Lessig, Industrial Building Materials,* and *Moore, supra,* hold that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be

inferred from such anticompetitive conduct. Therefore evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made.

Hallmark has failed to produce sufficient evidence that Stanray had the specific intent to monopolize the market for aluminum huts in Vietnam. The only inference one could draw from the evidence before the court was that Stanray had the intent to obtain this particular contract from the Army. Therefore we find the directed verdict in favor of Stanray as to its unilateral attempt to monopolize to be correct as a matter of law.

III

THE JUDGMENT NOTWITHSTANDING THE VERDICT

In his opinion granting the Reynolds and Stanray motions for a judgment notwithstanding the verdict, Judge Peckham based his ruling on three grounds: First, there was no substantial evidence upon which a jury could find a conspiracy between Reynolds and Stanray. Second, assuming *arguendo* that the evidence supported the jury's finding that a Reynolds-Stanray conspiracy did exist, Section 1 of the Sherman Act was not violated as a matter of law. Third, there was no *prima facie* evidence that the acts of the appellees caused damage to the appellant.

A. *Was the evidence sufficient to sustain the jury's verdict?*

The standard by which a judgment notwithstanding the verdict is measured is precisely the same as that for a

directed verdict. *Juhnke v. Eig Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971); 9 Wright & Miller, *Federal Practice and Procedure* §2537 (1971). The plaintiff still has the burden of establishing a *prima facie* case although he is entitled to the benefit of all favorable inferences which can be drawn from the evidence. *Independent Iron Works v. United States Steel Corp.*, 177 F. Supp. 743, 746 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Juhnke v. Eig Corp., supra*, 444 F.2d at 1325.

The crucial issue here is whether the Reynolds' demand for a $1.9 million letter of credit resulted from a conspiratorial agreement between Reynolds and Stanray. We agree with Judge Peckham that there were four essential facts before the jury: (1) Reynolds actively aided Hallmark in the preparation of its bid for an Army contract; (2) Reynolds also worked with Stanray on its development of a contract bid; (3) Stanray became aware of Reynolds' efforts to aid Hallmark and contacted Reynolds to ascertain the nature and extent of those efforts; (4) Reynolds demanded a letter of credit from Hallmark for the full amount of the proposed aluminum supply contract.[4] If the evidence showed: (1) that the Reynolds credit demand was unreasonable and (2) that Reynolds would benefit by refusing Hallmark's aluminum order, then this, together with the facts outlined above, would provide a sufficient basis for a jury to infer that a Reynolds-Stanray conspiracy existed.

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[4]Although Hallmark lays stress on Stanray's reaction to Reynolds' bid for the contract, we do not consider that an essential fact. See the discussion of the importance of the Reynolds' bid in §3, *infra*.

With respect to the credit demand, certainly Hallmark's financial position of near insolvency provides a legitimate business motive for the credit requirement.[5] See *Joseph C. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Moreover, Reynolds had nothing to gain by an unreasonable refusal to deal with Hallmark. The credit demand actually resulted in the loss of a $1.9 million opportunity for Reynolds. There was no reason for Reynolds to favor Stanray over Hallmark since the Reynolds' engineers had already determined that they could not supply Stanray with its needs. Even if Reynolds could have supplied the aluminum for Stanray's design, there was no reason to expect that Reynolds' refusal to sell to Hallmark would result in Stanray's obtaining the contract. Several other companies could have supplied Hallmark with its aluminum requirements.

Given no contrary evidence, a jury question might be presented as to Reynolds' motives in demanding the letter of credit, wholly apart from the wisdom of that decision. However, there were other non-conspiratorial motives involving the exercise of business judgment as to the attractiveness of the opportunity offered by Hallmark. Therefore, in view of the overwhelming contrary evidence, only one conclusion can be drawn: That Reynolds' security requirements did not result from conspiratorial motives. *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 277 (1968).

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[5]The persons responsible for the Reynolds credit decision testified that the decision was based upon independent considerations and that they had no contact with Stanray prior to the decision.

Since we have decided the evidence was insufficient to sustain the jury's verdict, we need not reach the other two grounds upon which the trial judge based his opinion.

IV

HALLMARK INDUSTRY v. HARVEY ALUMINUM, INC.

No. 26729

We now turn to the appeal in No. 26729. Appellant here contends that the trial court committed reversible error in excluding at the trial the so-called "Shrank reports" and related deposition testimony.

The Shrank reports consist of forms entitled "Daily Sales Report" filled out by Donald Shrank, then Sales Engineer for Harvey, and submitted to Harvey's district sales manager for the Los Angeles area. Shrank purported to record the results of his calls upon prospective purchasers of aluminum. The particular reports in question deal primarily with conversations between Shrank and a representative of Stanray.

The trial court excluded the documents on the grounds that they were hearsay statements which were not admissible under any exception to the hearsay rule, that they could not be received for any non-hearsay purpose, and that they contained undue opinions, conclusions, and impressions. Appellant contends that the excluded evidence was relevant and material, that it was admissible on several grounds, and that its exclusion was prejudicial to appellant's case.

We find it unnecessary to reach the issues raised by appellant's claim that the evidence was improperly excluded. If the evidence had been admitted at trial, the evidence against Harvey, taken as a whole, would not have been sufficient to support a verdict in favor of appellant. Therefore, if any error was committed by the trial judge, it was harmless because it could not have prejudiced the substantial rights of appellant. Fed. R. Civ. P. 61; *Vecchio v. Anheuser-Busch,* 328 F.2d 714, 719 (2nd Cir. 1964), *cert. denied,* 379 U.S. 831 (1964); *Jones v. Mutual Life Ins. Co. of New York,* 113 F.2d 873, 874 (8th Cir. 1940). Accordingly, we affirm in No. 26729.